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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Appellant, v. ERNEST CLEO FARRAND, Defendant and Respondent.	E065924 (Super.Ct.No. CR43974) OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge. Affirmed.

Michael A. Hestrin, District Attorney, and Donald W. Ostertag, Deputy District Attorney, for Plaintiff and Appellant.

Thea Greenhalgh, under appointment by the Court of Appeal, for Defendant and Respondent.

The People appeal from an order of the superior court granting defendant and respondent Ernest Cleo Farrand's petition (Pen. Code, § 1170.18)[1] to reduce his felony commercial burglary (§ 459) conviction to misdemeanor shoplifting (§ 459.5) under the Safe Neighborhoods and Schools Act (Proposition 47). (§ 1170.18.) On appeal, the People argue that (1) defendant failed to meet his burden of establishing eligibility for the redesignation of the offense to a misdemeanor under Proposition 47; and (2) defendant is ineligible for reduction because there is evidence defendant committed the burglary with the intent to commit a conspiracy. We disagree and affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND[2]

On June 30, 1992, codefendant John Johnson entered a Miller's Outpost store in Corona, California, and stole five pairs of Levi's jeans. Meanwhile, defendant waited outside the store inside his running vehicle. The vehicle's license plate was covered with a towel. As Johnson was exiting the store with the stolen jeans, defendant motioned to him from inside the car. Johnson got into defendant's car with the stolen jeans and defendant sped off at a high rate of speed. Johnson and defendant were eventually apprehended and identified as the burglary suspects in an infield lineup. The police report listed the total value of the stolen property as $160.

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[1] All future statutory references are to the Penal Code unless otherwise stated.

[2] The factual background is taken from the police report.

By felony information filed on July 28, 1992, defendant was charged with one count of felony commercial burglary (§ 459). Specifically, the charge stated that defendant and Johnson entered "a certain building . . . with [the] intent to commit theft and a felony." The information further alleged that defendant had suffered four prior prison terms within the meaning of section 667.5, subdivision (b).

On September 23, 1992, defendant pled guilty as charged and admitted the prior prison term allegations. In return, defendant was sentenced to a total term of two years in state prison.

On May 27, 2015, defendant filed a form petition to have his felony commercial burglary conviction designated a misdemeanor pursuant to section 1170.18, subdivision (f). Defendant's attorney noted on the form petition, under penalty of perjury, that "Defendant believes the value of the check or property does not exceed $950," and that defendant had completed his sentence on the felony.

The People filed a form response objecting to defendant's felony reduction on the ground defendant had not met his burden of proof. Specifically, the People stated: "Unknown circumstances [and] value. [Defendant] has failed to meet his burden."

The trial court sent the parties a notice of setting a hearing on defendant's petition for the purpose of determining the facts of the commercial burglary offense and appointed a public defender to represent defendant. The hearing notice stated: "Need facts of 459. PD app[oin]ted."

A hearing on defendant's petition was held on March 4, 2016. At that time, the trial court granted defendant's petition, and ordered defendant's felony commercial burglary reduced to misdemeanor shoplifting (§ 459.5). During the hearing, the prosecutor informed the court of the details of the crime and argued the crime was a "conspiracy to commit theft which is a wobbler." The court asked the prosecutor, "So you are agreeing it is under 950, but you're arguing it is a conspiracy." The prosecutor responded: "Yes. I don't know if there is a value, but five pairs of jeans would be under. So we are arguing it is a conspiracy given the extra steps of the defendant was the getaway driver, not the one actually in the store. He kept the car running and he had covered his license with a towel, shows that they clearly came into this conspiracy before the accomplice went in and stole the items." Upon the court's inquiry, the prosecutor also agreed that defendant was not charged with a conspiracy, but asserted the People "did not need to charge him at the time with the conspiracy" and that "[i]t is an uncharged theory of prosecution for 459." Defense counsel agreed with the recitation of the facts, and noted "It was Miller's Outpost, several Levis under $100." In response, the prosecutor requested to file the police report under seal. The trial court disagreed with the prosecutor's argument, noting conspiracy was not charged. The court found that defendant's commercial burglary offense was eligible for reduction to a misdemeanor and ordered the police report filed under seal.

The People filed a timely appeal.

II

DISCUSSION

On November 4, 2014, voters approved Proposition 47, the Safe Neighborhood and Schools Act, which became effective November 5, 2014. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 (*Rivera*).) Proposition 47 reduced certain drug- and theft-related crimes from felonies or wobblers to misdemeanors for qualified defendants and added, among other statutory provisions, sections 1170.18 and 459.5. (*Rivera*, at p. 1091.) Section 1170.18 creates a process permitting persons previously convicted of crimes as felonies, which might be misdemeanors under the new definitions in Proposition 47, to petition for resentencing. (*Rivera*, at pp. 1092-1093.)

Section 1170.18, subdivision (f), provides: "A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors." And, subdivision (g) provides that "If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor."

Penal Code section 459.5 was among the provisions added by Proposition 47. It reduces certain second degree burglaries to misdemeanors by defining them as "shoplifting," that is, "entering a commercial establishment with [the] intent to commit

larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950).” (§ 459.5, subd. (a).)

In this case, the trial court granted defendant’s petition to reduce his felony commercial burglary conviction to misdemeanor shoplifting. The People now appeal, asserting that defendant failed to establish eligibility and that defendant remained guilty of second degree burglary post-Proposition 47 because he committed the burglary with the intent to commit a conspiracy.

We review a trial court’s “legal conclusions de novo and its findings of fact for substantial evidence.” (*People v. Trinh* (2014) 59 Cal.4th 216, 236.) The interpretation of a statute is subject to de novo review on appeal. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916.) “In interpreting a voter initiative like [Proposition 47], [the courts] apply the same principles that govern statutory construction.” (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) “ ‘The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.]’ ” (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.) “In determining intent, we look first to the words themselves. [Citations.] When the language is clear and unambiguous, there is no need for construction. [Citations.] When the language is susceptible of more than one reasonable interpretation, however, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous

administrative construction, and the statutory scheme of which the statute is a part. [Citations.]" (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1007-1008.)

A. *Petitioner's Burden*

An applicant seeking redesignation of a felony to a misdemeanor bears the burden of producing evidence that the felony would have been a misdemeanor under Proposition 47. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879-880 (*Sherow*); *People v. Perkins* (2016) 244 Cal.App.4th 129, 140 (*Perkins*); *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 449; Evid. Code, § 500.) Evidence may come from within or outside the record of conviction, or from undisputed facts acknowledged by the parties. (*Perkins*, at p. 140 [any probative evidence]; *Sherow*, at p. 880 [petitioning defendant's testimony].)

The People contend the trial court erred in granting defendant's petition because defendant "failed to present any evidence regarding the underlying facts of his section 459 conviction" and merely "filed the stock resentencing form, checking the box for 'Defendant believes the value of the check or property does not exceed $950.' " In effect, the People contend the trial court was not permitted to reach the merits of defendant's petition without first finding defendant had made a prima facie case of entitlement to resentencing. The People rely on this court's opinion in *Perkins*, *supra*, 244 Cal.App.4th 129 to support their position.

A trial court need not consider the merits of a Proposition 47 petition unless the petitioner has made a prima facie showing of eligibility. (*Sherow*, *supra*, 239

Cal.App.4th 875; *Perkins*, *supra*, 244 Cal.App.4th 129.) In *Perkins*, this court held that to satisfy this initial burden, the petitioner must attach to his petition "some evidence" of eligibility. (*Perkins*, *supra*, at p. 137.) Here, defendant filed a form petition for resentencing alleging the amount of loss did not exceed $950. The form petition included a statement under penalty of perjury that appears to be signed by defendant's attorney. The People responded that defendant had failed to meet his burden, noting "Unknown circumstances [and] value." The trial court thereafter set a hearing on defendant's petition. At that hearing, the prosecutor recited the factual circumstances of the offense and acknowledged the value of the stolen property was less than $950. Defense counsel agreed with the prosecutor's recitation of the facts and noted the stolen property was several Levi's jeans under $100.

It is a basic, well-settled principle that a party's duty to set out a prima facie case may be discharged by the opposing party's concession. As our high court long ago explained, "when the [party who carries the burden] has proved *or the* [*opposing party*] *has conceded*" an element of a claim "a *prima facie* case . . . is thereby made, which discharges *the burden of proof*." (*Graham v. Larimer* (1890) 83 Cal. 173, 177-178, italics added; accord, *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 123 [the opposing party's "concession established the facts necessary to support a prima facie claim of privilege . . . and passed the burden to [the party opposing privilege]"].) The function of pleadings is to aid the court in determining which factual issues are in dispute. (*People v. Duvall* (1995) 9 Cal.4th 464, 480 [habeas pleadings

"fulfill [the] function of narrowing the facts and issues to those that are truly in dispute"].) "The initial screening of the petition for resentencing is similar to the initial screening of a petition for writ of habeas corpus. California Rules of Court, [r]ule 4.551(f) provides that '[a]n evidentiary hearing is required if . . . there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact.' " (Couzens & Bigelow, Proposition 47: "The Safe Neighborhoods and Schools Act" (May 2016 rev. ed.) p. 39, at <http://www.courts.ca.gov/documents/Prop-47-Information.pdf> [as of Dec. 9, 2016].)

Moreover, the prosecutor requested and defense counsel did not object to the trial court filing the police report, which contained the value of the stolen property.[3] The police report shows the total value of the stolen property as $160.

The pleadings in this case, taken together, as well as concessions made by the People conveyed to the trial court there were no disputed material facts regarding defendant's eligibility. The petition declared the amount of loss did not exceed $950, and the People agreed the value of the stolen property was less than $950. The People's concession to defendant's petition discharged the prima facie burden thereby requiring consideration of his petition on the merits. The trial court reasonably concluded the value of the stolen property did not exceed $950, as established by the parties' statements and

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[3] With proper foundation, a police report is admissible under the official records exception to the hearsay rule. (Evid. Code, § 1280.) Neither party objected to the admissibility of the police report.

the police report. Accordingly, under these circumstances, we cannot find the trial court abused its discretion by reaching the merits of defendant's petition.

B. *Conspiracy to Commit Burglary*

The People contend defendant's commercial burglary conviction is not eligible for reduction to misdemeanor shoplifting under Proposition 47 because the crime was a conspiracy. The People argue it is irrelevant that they did not allege conspiracy in the complaint. We disagree.

"Conspiracy is an inchoate crime. [Citation.] It does not require the commission of the substantive offense that is the object of the conspiracy. [Citation.] 'As an inchoate crime, conspiracy fixes the point of legal intervention at [the time of] agreement to commit a crime,' and 'thus reaches further back into preparatory conduct than attempt . . . .' [Citation.]" (*People v. Swain* (1996) 12 Cal.4th 593, 599-600 (*Swain*).)

A conspiracy is defined as " 'two or more persons conspir[ing]' '[t]o commit any crime,' together with proof of the commission of an overt act 'by one or more of the parties to such agreement' in furtherance thereof. (Pen. Code, § 182, subd. (a)(1), 184.) 'Conspiracy is a "specific intent" crime. . . . The specific intent required divides logically into two elements: (a) the intent to agree, or conspire, and (b) the intent to commit the offense which is the object of the conspiracy. . . . To sustain a conviction for conspiracy to commit a particular offense, the prosecution must show not only that the conspirators intended to agree but also that they intended to commit the elements of that offense.' [Citation.] In some instances, the object of the conspiracy 'is defined in terms of

proscribed conduct.' [Citation.] . . . In other instances, it 'is defined in terms of . . . a proscribed result under specified attendant circumstances.' [Citation.]" (*Swain, supra*, 12 Cal.4th at p. 600, italics omitted.) Proposition 47 does not apply to convictions for conspiracy. (*People v. Segura* (2015) 239 Cal.App.4th 1282.)

Like aiding and abetting, conspiracy is itself a theory of liability. (*People v. Hajek & Vo* (2014) 58 Cal.4th 1144, 1201 (*Hajek & Vo*), abrogated on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) We recognize conspiracy need not in all instances be charged, so long as the defendant is put on notice the prosecution is asserting the theory against the defendant. (*Ibid*.) In *Hajek & Vo*, the defendants argued that "the use of an uncharged conspiracy violated due process by depriving them of notice of the charges against them." (*Ibid*.) The court in *Hajek & Vo* rejected the argument, stating that " ' "Due process of law requires that an accused be advised of the charges against him so that he has a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial." ' " (*Ibid*.) The court in *Hajek & Vo* concluded the defendants were so advised because, "[b]y the time the trial began, defendants were well aware the prosecutor intended to proceed on a conspiracy theory to establish derivative liability." (*Ibid*.)

This was not the case in the instant matter. The complaint and information do not allege defendant conspired with anyone in committing the burglary. There is no mention of a conspiracy in the burglary. Count 1 merely states that defendant and Johnson willfully and unlawfully entered "a certain building" with intent to commit theft and a

felony. Unlike in *Hajek & Vo, supra*, 58 Cal.4th 1144, there was no preliminary hearing or trial. There being no evidence in the record to the contrary, we must conclude that at the time defendant pled guilty and was sentenced, he did not receive notice he was being charged with committing a conspiracy. Therefore, regardless of whether there was admissible evidence supporting a conspiracy conviction, defendant is not barred from reducing his felony commercial burglary conviction to misdemeanor shoplifting. Holding otherwise would violate defendant's due process rights to proper notice of being charged with a conspiracy.

Furthermore, allowing the People to establish ineligibility for sentence reduction based on conspiracy, after defendant pled guilty to burglary, with intent to commit a theft, not a conspiracy, would violate double jeopardy and fair trial principles. Double jeopardy forbids a second trial for the purpose of affording the People a second opportunity to provide evidence it failed to produce in the first proceeding. (*Burks v. United States* (1978) 437 U.S. 1, 11.) Section 654, subdivision (a), "provides that '[a]n acquittal or conviction and sentence under any one [provision of law] bars a prosecution for the same act or omission under any other.' In *Kellett v. Superior Court* (1966) 63 Cal.2d 822, 827 [], the court stated that '[w]hen, as here, the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for good cause. Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial

proceedings culminate in either acquittal or conviction and sentence.' " (*Sanders v. Superior Court* (1999) 76 Cal.App.4th 609, 614, fn. omitted.) The People's failure to charge defendant with a conspiracy and prosecute him for that offense bars the People from post-conviction reliance on the uncharged theory of conspiracy as a basis for preventing him from benefiting from sentence reduction under Proposition 47.

In addition, the People failed to establish at the hearing on defendant's petition that defendant committed the burglary with intent to commit a conspiracy. The People relied solely on the police report to establish a conspiracy as a basis of ineligibility. Only those facts in the police report observed by the reporting officer or statements in the report falling within some other hearsay exception constitute admissible evidence that can be relied upon in establishing a conspiracy. (*Rupf v. Yan* (2000) 85 Cal.App.4th 411, 430-431.) The admissible facts in the police report do not establish that defendant and Johnson entered the store with intent to commit a conspiracy. Rather, the admissible statements in the police report indicate Johnson entered the store with the intent to steal jeans, not a conspiracy, while defendant waited outside for Johnson in his car. Accordingly, we conclude the trial court did not err in finding defendant's felony commercial burglary conviction was eligible for reduction to a misdemeanor under Proposition 47.

III

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

MILLER
J.

SLOUGH
J.